

**United States Department of Labor
Employees' Compensation Appeals Board**

S.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
NATIONAL CEMETARY, Eagle Point, OR,
Employer**

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**Docket No. 16-1913
Issued: April 11, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 29, 2016 appellant filed a timely appeal from a June 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective June 23, 2016 under 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested oral argument before the Board. By order dated February 7, 2017, the Board exercised its discretion and denied the request, finding that the issues could properly be adjudicated based on the evidence of record. *Order Denying Oral Argument*, Docket No. 16-1913 (issued February 7, 2017).

FACTUAL HISTORY

On January 10, 2013 appellant, then a 59-year-old cemetery caretaker, filed a traumatic injury claim (Form CA-1) alleging that he injured his right knee in the performance of duty on January 4, 2013. He alleged that while setting up a casket-lowering device the ground gave way, causing him to fall and twist his right knee. On May 21, 2013 OWCP accepted the claim for right medial meniscus derangement, right knee internal derangement, and tibiofibular ligament sprain.

In a report dated August 2, 2013, Dr. David Galt, a Board-certified orthopedic surgeon, indicated that appellant had undergone a partial medial and lateral meniscectomy that date. Appellant stopped work and began receiving wage-loss compensation as of August 23, 2013.

On March 10, 2014 appellant underwent a total right knee replacement surgery. A nurse's report dated July 1, 2014 indicated that appellant had returned to work on June 9, 2014 at four hours per day, increasing to six hours per day as of June 30, 2014.

Appellant underwent a functional capacity evaluation (FCE) on September 30, 2014. By letter dated August 14, 2015, the employing establishment offered him a position as an information receptionist consistent with the FCE restriction. The job required standing or walking for one half to one hour in duration, no more than four hours in an eight-hour day. On August 24, 2015 appellant rejected the job offer because he claimed that he could not physically perform the position.

OWCP referred appellant, along with medical records and a statement of accepted facts (SOAF), to Dr. Ronald Teed, a Board-certified orthopedic surgeon. In a report dated October 3, 2015, Dr. Teed provided a history, reviewed medical evidence, and provided results on examination. He diagnosed resolved tibiofibular ligament sprain, resolved medial meniscus derangement of the right knee, resolved internal right knee derangement, degenerative joint disease, status post total knee arthroplasty, right knee arthrofibrosis, and chronic right knee pain. Dr. Teed wrote that appellant's right knee condition was significantly limiting. He indicated that the arthroplasty surgery was for degenerative joint disease, unrelated to the January 4, 2013 employment injury. As to work restrictions from employment injuries or preexisting conditions, Dr. Teed wrote, "light activities with intermittent standing and walking no greater than six-hour workday." He completed a Form OWCP-5C dated December 15, 2015. Dr. Teed indicated that appellant could work an eight-hour day, with restrictions of no more than two hours standing and walking.³ He also indicated that appellant had a 20-pound lifting restriction, with no squatting or kneeling.

By letter dated February 29, 2016, the employing establishment again offered appellant a full-time position as an information receptionist. It indicated that the position would conform to work restrictions provided by Dr. Teed, of two hours standing and walking, with no squatting or kneeling. A position description indicated that the job was performed in an office setting with no physical demands.

³ The form indicated that Dr. Teed initially checked a box to indicate that appellant could not work eight hours, but crossed this out and initialed the change, checking a box that appellant could work eight hours per day.

On March 11, 2016 appellant rejected the job offer. He wrote that he had developed back problems from sitting, he had not received proper care after his knee surgery, and he was still in pain.

In a letter dated March 29, 2016, OWCP advised appellant that it found the job offer of information receptionist to be a suitable position. It indicated that the case would be held open for 30 days with the expectation that appellant would accept the position. The provisions of 5 U.S.C. § 8106(c)(2) were noted, and appellant was advised that if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated.

On April 6, 2016 appellant submitted an undated letter writing that he was appealing OWCP's decision and had an appointment with Dr. Galt. He asserted that the case needed to be looked at again and he felt he was still injured. On April 25, 2016 appellant submitted a form report from Dr. Galt dated April 21, 2016. Dr. Galt indicated that appellant could lift up to 25 pounds occasionally, with no squatting or kneeling. He wrote that appellant should be able to stand or walk for a total of two hours, with a break every half hour, and should be able to sit six hours, with a break every two hours.

Appellant, through his congressional representative, submitted additional statements on April 27, 2016. He argued that he was permanently disabled and discussed the history of his knee injury.

By letter dated May 6, 2016, OWCP advised appellant's congressional representative that it expected to make a decision by May 16, 2016. On June 13, 2016 it received a May 23, 2016 FCE. The report included Dr. Galt's name and was signed by occupational and physical therapists.

By decision dated June 23, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 23, 2016. It found that he had refused an offer of suitable work and terminated his compensation pursuant to 5 U.S.C. § 8106(c)(2). OWCP found it "did not receive a written explanation to the 30-day notice regarding any reason for refusing the position."

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁴ To justify such a termination, OWCP must show that the work offered was suitable.⁵

⁴ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁵ *John E. Lemker*, 45 ECAB 258 (1993).

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow him an opportunity to provide reasons for refusing the offered position.⁶ If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.⁷

Section 10.516 of FECA's implementing regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability.⁸ If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.⁹ After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹⁰ However, the employee remains entitled to medical benefits.¹¹

ANALYSIS

In the present case, the employing establishment offered appellant the full-time position of information receptionist on February 29, 2016. Appellant rejected the offer, asserting that he had developed back problems from sitting and ongoing knee pain. As such, he could not physically perform the offered position. OWCP terminated appellant's wage-loss compensation and medical finding that appellant had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

OWCP issued a letter dated March 29, 2016, advising appellant that it found the offered information reception position suitable, but, in the final decision dated June 23, 2016, it found appellant had not submitted a written explanation to the March 29, 2016 letter, regarding reasons for refusing the position. OWCP did not discuss any additional evidence received between March 29 and June 23, 2016.

The record indicates that appellant did respond in writing to the March 29, 2016 letter with reasons for refusing the position. Appellant submitted a statement on April 6, 2016 contesting the suitable work letter. He wrote that he felt he was still injured and his claim should be reevaluated. On April 25, 2016 appellant submitted the April 21, 2016 report from Dr. Galt

⁶ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁷ *Id.*

⁸ 20 C.F.R. § 10.516.

⁹ *Id.*

¹⁰ *Id.* at § 517.

¹¹ *Id.*

with work restrictions. He subsequently submitted additional statements through his congressional representative on April 27, 2016, arguing that he was permanently disabled.

Under established procedures as noted above, OWCP should have issued a letter with respect to the evidence and arguments received after the March 29, 2016 letter. As appellant submitted additional evidence within the 30-day period afforded by OWCP of responding to the suitability determination, he was entitled to have this evidence evaluated to determine whether or not he had provided acceptable reasons for refusing the offer of suitable work.¹² OWCP should have reviewed the evidence and argument, and if it determined the reasons unacceptable, issued a 15-day letter providing appellant a final opportunity to accept the position.¹³ 、

The Board accordingly finds that OWCP failed to follow established procedures with respect to termination of compensation under 5 U.S.C. § 8106(c). The Board has recognized that 5 U.S.C. § 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.¹⁴ It is OWCP's burden of proof to terminate compensation and, due to the above-noted procedural error, the Board finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective June 23, 2016 under 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

¹² *C.C.*, Docket No. 15-1778 (issued August 16, 2016). Even if submitted after the 30-day period, but prior to the final decision, OWCP must evaluate the evidence to determine if acceptable reasons for refusing the position. *See M.M.*, 59 ECAB 680 (2008).

¹³ *R.G.*, Docket No. 15-0492 (issued November 16, 2015); *see also Maggie L. Moore*, *supra* note 6; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(e)(3) (June 2013) (if new evidence received, it should be identified in the 15-day letter).

¹⁴ *H. Adrian Osborne*, 48 ECAB 556 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 23, 2016 is reversed.

Issued: April 11, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board